

September 2, 2020

Via FOIA Online.gov to:

FOIA Officer
National FOIA Office
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, NW (2310A)
Washington, DC 20460

Re: FOIA Request for Records concerning Perchlorate

Dear FOIA Officer:

I write on behalf of the Natural Resources Defense Council (NRDC) to request disclosure of records pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552, and applicable EPA regulations at 40 C.F.R. § 2.100-2.406.

I. Requested Records and Disclosure Method

Please produce records¹ of the following types in EPA's possession, custody or control written since February 1, 2011 that are not included in the agency's below-listed public dockets for perchlorate² and that reflect:

¹ "Records" means anything denoted by the use of that word or its singular form in the text of FOIA and includes correspondence, minutes of meetings, memoranda, notes, emails, notices, facsimiles, charts, tables, presentations, orders, filings, internal messaging systems, and other writings (handwritten, typed, electronic, or otherwise produced, reproduced, or stored). NRDC seeks responsive records in the custody of any agency office, including, but not limited to the Office of the Administrator (such as the Immediate Office of the Administrator, the Office of Congressional and Intergovernmental Relations, the Office of Public Affairs, and the Office of Children's Health Protection), the Office of Water, the Office of Research and Development, and the Office of General Counsel. Please produce records in their native format with their metadata intact.

² Records included in their entirety in the following EPA dockets are excluded from this request: EPA-HQ-OW-2018-0780 and related dockets EPA-HQ-OW-2009-0297; EPA-HQ-OW-2016-0438; and EPA-HQ-OW-2016-0439; or the EPA Science Advisory Board website.

1. Any communications between EPA or its staff or contractors with the Department of Defense (DOD) or the National Aeronautics and Space Administration (NASA), or their contractors, or between DOD or NASA and their contractors, regarding perchlorate.
2. Any information on the extent of known or suspected perchlorate contamination of groundwater or drinking water at or near the facilities owned or controlled by DOD, NASA, or their contractors, or the cost or implications of cleaning up such contamination.
3. Any information on the extent of perchlorate in drinking water collected since the First Unregulated Contaminant Monitoring Rule, which collected data in 2001-2005.
4. Any communications between EPA or its staff or contractors with the Office of Management and Budget or any other part of the Executive Office of the President regarding perchlorate.
5. Any communications between EPA or its staff or contractors with the Perchlorate Study Group or its members (including Aerojet Rocketdyne, American Pacific Corporation, Lockheed Martin, Orbital- ATK, Northrop Grumman, or their predecessor or successor companies), the American Chemistry Council, the Chlorine Institute, or their contractors or agents (including Ramboll, Environ, Intertox, Gradient, or others) regarding perchlorate.
6. Any records reflecting EPA office reviews during the Final Agency Review (FAR) or any comparable review of the agency's proposed action on perchlorate in drinking water (including the proposed rule issued June 26, 2019, 84 Fed.Reg. 30524) or final decision on perchlorate in drinking water (including the final action issued July 21, 2020, 85 Fed.Reg. 43990), including any concurrence, non-concurrence, concurrence with comments, or other commentary on the rule or decision.

. Please either email responsive records to me at eolson@nrdc.org, or upload them to the following OneDrive folder (https://nrdc1-my.sharepoint.com/:f:/g/personal/eolson_nrdc_org/EoJ2YYBEYfBEh0327F6p-i4B06RoFWD67HRDp_rN94GvHg?e=OpkSWr) where you can upload the records. Please note that my email account cannot accept .zip files. Please release responsive records to me on a rolling basis, starting with the most recent records dating from January 2017 to present. If you determine that any of the records I've described above are already publicly available, please let me know where to find them.

II. Request for a Fee Waiver (or Reduction)

NRDC requests that EPA waive any fee it would otherwise charge for searching for and producing the requested records. FOIA dictates that requested records be provided

without charge “if disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester.” 5 U.S.C. § 552(a)(4)(A)(iii); *see also* 40 C.F.R. § 2.107(l)(1). As I explain below, NRDC’s requested disclosure meets both requirements. NRDC is also “a representative of the news media” entitled to fee reduction. 5 U.S.C. § 552(a)(4)(A)(ii)(II); *see also* 40 C.F.R. § 2.107(c)(1)(iii).

Please disclose the records requested above regardless of your decision on whether to waive or reduce fees. To expedite disclosure, NRDC will, if necessary and under protest, pay fees in accordance with EPA’s FOIA regulations at 40 C.F.R. § 2.107(c)(1)(iv) for all or a portion of the requested records. *See* 40 C.F.R. § 2.107(l)(4). Please contact me before doing anything that would cause the fee to exceed \$250.

A. NRDC Satisfies the First Fee Waiver Requirement

The disclosure requested here is “likely to contribute significantly to public understanding of the operations or activities of the government.” 5 U.S.C. § 552(a)(4)(A)(iii); 40 C.F.R. § 2.107(l)(1). Each of the four factors used by EPA to evaluate the first fee waiver requirement indicates that a fee waiver is appropriate for this request. *See*, 40 C.F.R. § 2.107(l)(2).

1. Subject of the request

The records requested here are important to detailing EPA’s process for deciding not to regulate perchlorate in drinking water. The requested records thus directly concern “the operations or activities of the government.” 40 C.F.R. § 2.107(l)(2)(i).

2. Informative value of the records to be disclosed

The requested records are “likely to contribute to” the public’s understanding of government operations and activities, 40 C.F.R. § 2.107(l)(2)(ii). The public does not currently possess comprehensive information regarding the government’s operations, activities, and the role of various components of EPA, OMB, DOD, NASA and their contractors and other industries in EPA’s actions addressing perchlorate in drinking water and the environment, and the potential health risks this may pose. There is more than a reasonable likelihood that these records have informative value to the public because of EPA’s reversal of its position on regulating perchlorate in drinking water from 2011 to 2020, and the substantial demonstrated public concern with EPA’s actions regarding perchlorate as highlighted by the extensive press coverage of the issue. The role of industry

players who manufacture and use perchlorate and are responsible for extensive environmental and drinking water contamination with this toxic chemical, and of government agencies including DOD and NASA and their contractors that have used and released large amounts of perchlorate into the environment is of substantial informative value. As a result of records released due to previous FOIA requests that NRDC filed with EPA, DOD and OMB regarding perchlorate over a decade ago, there was extensive press coverage and public attention focused on these issues. *See Citizens for Responsibility & Ethics in Washington v. U.S. Dep't of Health & Human Servs.*, 481 F. Supp. 2d 99, 109 (D.D.C. 2006).

3. Likely contribution to public understanding

Because NRDC is a “representative of the news media,” as explained in Part II.C below, EPA must presume that this disclosure is likely to contribute to public understanding of its subject. 40 C.F.R. § 2.107(l)(2)(iii). Even if NRDC were not a media requester, its expertise in drinking water quality issues including specifically expertise on perchlorate in drinking water, extensive communications capabilities, and proven history of dissemination of information of public interest—including information obtained from FOIA records requests—show that NRDC has the ability and will to use disclosed records to reach a broad audience of interested persons with any relevant and newsworthy information the records reveal. There is accordingly a strong likelihood that disclosure of the requested records will increase public understanding of the subject matter. *See Judicial Watch, Inc. v. Rossotti*, 326 F.3d 1309, 1314 (D.C. Cir. 2003) (finding that a requester that specified multiple channels of dissemination and estimated viewership numbers demonstrated a likelihood of contributing to public understanding of government operations and activities).

NRDC’s more than three million members and online activists are “a reasonably broad audience of persons interested in the subject” of perchlorate in drinking water, 40 C.F.R. § 2.107(l)(2)(iii). When this group is combined with the other audiences for the numerous publications and other platforms to which NRDC contributes, the likely audience of interested persons to be reached is certainly “reasonably broad.” 40 C.F.R. § 2.107(l)(2)(iii).

NRDC can disseminate newsworthy information collected through this FOIA request to its members, online activists and other members of the public through many channels, free of charge. As of summer 2020, these channels include:

- NRDC's website, <http://www.nrdc.org> (sample homepage at Att. 1), is updated daily and draws approximately 1.96 million page views and 982,000 unique visitors per month. The website features NRDC staff blogs, original reporting of environmental news stories, and more.
- NRDC's Activist email list includes more than 1.7 million members and online activists who receive regular communications on urgent environmental issues. (sample email at Att. 2) This information is also made available through NRDC's online Action Center at <https://www.nrdc.org/actions> (Att. 3).
- NRDC publishes a monthly electronic environmental newsletter, *NRDC Insider*, which is distributed by email to more than 1,128,420 subscribers.
- NRDC also publishes a quarterly environmental newsletter, *Nature's Voice*, <https://www.nrdc.org/natures-voice>, which is distributed to more than 370,000 subscribers (sample at Att. 4).
- NRDC updates and maintains several social media accounts with tens to hundreds of thousands of followers. Its major accounts include Facebook (947,358 followers) (Att. 5), Twitter (336,443 followers) (Att. 6), Instagram (289,855 followers) (Att. 7), YouTube (23,300 subscribers) (Att. 8), and LinkedIn (34,553 followers) (Att. 9).
- NRDC also uses Medium (sample page at Att. 10) and the Huffington Post (sample page at Att. 11) as distribution channels for our content.

NRDC staff also write papers and reports; provide legislative testimony; present at conferences; direct and produce documentary films; and contribute to national radio, television, newspaper, magazine and web stories and academic journals. Some examples of these contributions include:

- Article, "E.P.A. Won't Regulate Toxic Compound Linked to Fetal Brain Damage," *New York Times*, June 18, 2020 (reporting EPA decision against regulating perchlorate and quoting NRDC).(Exhibit A)
- Article, "E.P.A. Opts Against Limits on Water Contaminant Tied to Fetal Damage," *New York Times*, May 14, 2020 (discussing EPA decision not to regulate perchlorate in drinking water and citing and quoting NRDC)(Exhibit B)

- Article, “EPA decides against limits on drinking water pollutant linked to health risks, especially in children,” *Washington Post*, May 14, 2020 (noting EPA decision not to regulate perchlorate and quoting NRDC) (Exhibit C)
- Congressional testimony, Erik D. Olson, House Committee on Energy and Commerce, Subcommittee on Environment “Reinvestment and Rehabilitation of our Nation’s Safe Drinking Water Delivery Systems,” March 16, 2017 (summarizing perchlorate contamination and other issues necessitating investment in drinking water treatment). (Exhibit D)
- Congressional testimony, Erik D. Olson, Senate Committee on Environment and Public Works, “The Federal Role in Keeping Water and Wastewater Infrastructure Affordable,” April 7, 2016, (discussing, among other issues, the need for funding and action to address perchlorate contamination)(Exhibit E)
- Congressional testimony, Mae Wu, House Committee on Energy and Commerce, Subcommittee on the Environment and Climate Change, July 28, 2020, “There’s Something in the Water: Reforming Our Nation’s Drinking Water Standards.” (summarizing need for action on perchlorate and PFAS among other issues)(Exhibit F)
- Article, “Judge on EPA: Someone Needs to ‘Light a Fire Under Them,’” *Undark*, September 28, 2016 (discussing federal judge’s criticism of EPA’s slow response to perchlorate in drinking water as part of NRDC’s lawsuit, and FOIA documents showing industry influence). (Exhibit G)
- Article, “Health Standard for Perchlorate in Drinking Water Too High, Panel Says,” Associated Press, *Environmental News Network*, Jan. 11, 2005 (discussing EPA actions on perchlorate, NAS study, and documents obtained by NRDC under FOIA showing industry influence). (Exhibit H)
- Issue Brief, “White House and Pentagon Bias National Academy Perchlorate Report,” January 10, 2005 (NRDC issue brief highlighting documents obtained under FOIA documenting White House, DOD interference with EPA and NAS actions on perchlorate, which led to widespread press coverage).(Exhibit I)
- Article, “Setting A Safe Dose for Perchlorate,” *Chemical and Engineering News*, January 17, 2005 (noting NAS report on perchlorate and citing NRDC’s allegations of industry influence based on FOIA documents). (Exhibit J)
- Publication, “What’s On Tap?” 2003 (excerpt of NRDC report discussing perchlorate levels in multiple cities, and citing certain data obtained under FOIA)(Exhibit K)

- Article, “Interior Department Worked Behind the Scenes with Energy Industry to Reverse Royalties Rule,” *Wash. Post*, Oct. 6, 2017 (discussing documents obtained through a FOIA request submitted by NRDC and quoting NRDC Senior Policy Advocate Theo Spencer) (Att. 12);
- Documentary, *Sonic Sea* (2016), featured on the Discovery Channel (Emmy award-winning documentary directed and produced by NRDC Deputy Director of Communications Daniel Hinerfeld) (Att. 13);
- Research article, “The Requirement to Rebuild US Fish Stocks: Is it Working?” *Marine Policy*, July 2014 (co-authored by NRDC Oceans Program Senior Scientist Lisa Suatoni and Senior Attorney Brad Sewell) (Att. 14);
- Issue brief, “The Untapped Potential of California’s Water Supply: Efficiency, Reuse, and Stormwater,” June 2014 (co-authored by NRDC Water Program Senior Attorney Kate Poole and Senior Policy Analyst Ed Osann) (Att. 15); *see also* “Saving Water in California,” *N.Y. Times*, July 9, 2014 (discussing the report’s estimates) (Att. 16);
- Congressional testimony, David Doniger, NRDC Climate and Air Program Policy Director and Senior Attorney, before the United States House Subcommittee on Energy and Power, June 19, 2012 (Att. 17);
- Conference brochure, “World Business Summit on Climate Change,” May 2009 (featuring former NRDC Director for Market Innovation Rick Duke) (excerpt at Att. 18);

NRDC’s legal, scientific, and other experts have a history of using information obtained through FOIA requests to inform the public about a variety of issues, including energy policy, climate change, wildlife protection, nuclear weapons, pesticides, drinking water safety, and air quality. Many examples of this with respect to perchlorate in water specifically are noted in the Exhibits above. In addition, for example:

- Through FOIA and other sources, NRDC obtained information on levels of arsenic in drinking water nationwide and used it in a report, *Arsenic and Old Laws* (2000) (excerpt at Att. 19). The report explained how interested members of the public could learn more about arsenic in their own drinking water supplies. *Id.* *See also* Steve LaRue, “EPA Aims to Cut Levels of Arsenic in Well Water,” *San Diego Union-Tribune*, June 5, 2000, at B1 (referencing NRDC’s report) (Att. 20).
- Through FOIA, NRDC obtained an ExxonMobil memorandum advocating the replacement of the sitting head of the Intergovernmental Panel on Climate Change,

and used the document to help inform the public about what may have been behind the Bush administration's decision to replace Dr. Robert Watson. *See* NRDC Press Release and attached Exxon memorandum, "Confidential Papers Show Exxon Hand in White House Move to Oust Top Scientist from International Global Warming Panel," Apr. 3, 2002 (Att. 21). *See also* Elizabeth Shogren, "Charges Fly Over Science Panel Pick," *L.A. Times*, Apr. 4, 2002, at A19 (Att. 22).

- NRDC scientists have used information obtained through FOIA to publish analyses of the United States' and other nations' nuclear weapons programs. In 2004, for example, NRDC scientists incorporated information obtained through FOIA into a feature article on the United States' plans to deploy a ballistic missile system and the implications for global security. Hans M. Kristensen, Matthew G. McKinzie, and Robert S. Norris, "The Protection Paradox," *Bulletin of Atomic Scientists*, Mar./Apr. 2004 (Att. 23).
- NRDC has used White House documents obtained through FOIA and other sources to inform the public about EPA's decision not to protect wildlife and workers from the pesticide atrazine in the face of industry pressure. *See Still Poisoning the Well: Atrazine Continues to Contaminate Surface Water and Drinking Water in the United States* (Apr. 2010) (update to 2009 report), <http://www.nrdc.org/health/atrazine/files/atrazine10.pdf> (excerpt at Att. 24). *See also* William Souder, "It's Not Easy Being Green: Are Weed-Killers Turning Frogs into Hermaphrodites?" *Harper's Magazine*, Aug. 1, 2006 (referencing documents obtained and posted online by NRDC) (Att. 25).
- NRDC obtained, through FOIA, FDA review documents on the nontherapeutic use of antibiotic additives in livestock and poultry feed. NRDC used these documents to publish a January 2014 report, titled *Playing Chicken with Antibiotics*, that reveals decades of FDA hesitancy to ensure the safety of these drug additives (Att. 26). *See also* P.J. Huffstutter and Brian Grow, "Drug Critic Slams FDA over Antibiotic Oversight in Meat Production," *Reuters*, Jan. 27, 2014 (discussing report) (Att. 27).
- In April 2014, NRDC used FOIA documents to prepare a report on potentially unsafe chemicals added to food, without FDA oversight or public notification. The report, *Generally Recognized as Secret: Chemicals Added to Food in the United States*, reveals concerns within the agency about several chemicals used as ingredients in food that manufacturers claim are "generally recognized as safe" (Att. 28). *See also* Kimberly

Kindy, “Are Secret, Dangerous Ingredients in Your Food?” *Wash. Post*, Apr. 7, 2014 (discussing report) (Att. 29).

- NRDC obtained through FOIA and publicized emails between the Trump transition team and industry officials regarding reversal of Obama-era preliminary restrictions on the proposed Pebble Mine. This cast light on an issue of considerable public interest. *See, e.g.*, Kevin Bogardus and Dylan Brown, “‘Homework Assignment’ — How Pebble Lobbied Trump’s EPA,” *E&E News*, June 8, 2017 (Att. 30).

In short, NRDC has proven its ability to digest, synthesize, and quickly disseminate to a broad audience newsworthy information gleaned through FOIA requests like this one.

4. Significance of the contribution to public understanding

The records requested here shed light on a matter of considerable public interest and concern: as noted above, there is substantial public interest in the issue of perchlorate in drinking water and the influence of DOD and other agencies and industry in shaping EPA’s and the government’s response to this problem, as illustrated in Exhibits A through K, which were discussed above. Public understanding of perchlorate in drinking water and industry’s and other agencies’ roles in regulating it would be significantly enhanced by disclosure of the requested records concerning this topic. Disclosure would help the public to more effectively evaluate EPA’s and the government’s response to the problem, industry’s and other agencies’ roles in shaping that response, and to better understand and evaluate EPA and other agency actions (and inaction) on perchlorate. For example, in 2011 EPA concluded that perchlorate should be regulated in drinking water, and in 2020 reversed itself. Disclosure will help the public better understand some of the key inputs into the agency’s actions.

B. NRDC Satisfies the Second Fee Waiver Requirement

Disclosure of the requested records would also satisfy the second prerequisite of a fee waiver request because NRDC does not have any commercial interest that would be furthered by the disclosure. 5 U.S.C. § 552(a)(4)(A)(iii); 40 C.F.R. § 2.107(l)(1), (3). NRDC is a not-for-profit organization; it uses information obtained under FOIA for its own public-information and advocacy purposes, and does not resell this information. “Congress amended FOIA to ensure that it be ‘liberally construed in favor of waivers for noncommercial requesters.’” *Rossotti*, 326 F.3d at 1312 (internal citation omitted); *see Natural Res. Def. Council v. United States Env’tl. Prot. Agency*, 581 F. Supp. 2d 491, 498

(S.D.N.Y. 2008). NRDC wishes to serve the public by reviewing, analyzing, and disclosing newsworthy and presently non-public information about perchlorate. As noted at Part II.A, any EPA and other federal agency work on perchlorate relates to a matter of considerable public interest and concern. Disclosure of the requested records will contribute significantly to public understanding of perchlorate and associated threats to human health and the environment.

C. NRDC Is a Media Requester

Even if NRDC were not entitled to a public interest waiver of all costs and fees, it would be a representative of the news media entitled to a reduction of fees under FOIA, 5 U.S.C. § 552(a)(4)(A)(ii), and EPA's FOIA regulations, 40 C.F.R. § 2.107(c)(1)(iii); *see also* 40 C.F.R. § 2.107(b)(6) (defining "[r]epresentative of the news media"). A representative of the news media is "any person or entity that gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw materials into a distinct work, and distributes that work to an audience." 5 U.S.C. § 552(a)(4)(A)(ii); *see also Elec. Privacy Info. Ctr. v. Dep't of Def.*, 241 F. Supp. 2d 5, 6, 11-15 (D.D.C. 2003) (a "non-profit public interest organization" qualifies as a representative of the news media under FOIA where it publishes books and newsletters on issues of current interest to the public); Letter from Alexander C. Morris, FOIA Officer, United States Dep't of Energy, to Joshua Berman, NRDC (Feb. 10, 2011) (Att. 11) (granting NRDC media requester status).

NRDC is in part organized and operated to gather and publish or transmit news to the public. For example, NRDC publishes original reporting of environmental news stories on its website at <https://www.nrdc.org/stories> and at <https://www.nrdc.org/onearth>. As explained in Part II.A, NRDC also distributes regular newsletters, *NRDC Insider* and *Nature's Voice*, for hundreds of thousands of subscribers; issues other action alerts, public reports and analyses; and maintains free online libraries of these publications. *See* 40 C.F.R. § 2.107(b)(6) ("Examples of news media include . . . publishers of periodicals."). NRDC also maintains a significant additional communications presence through its staff blogs on www.nrdc.org, which are updated regularly and feature writing about current environmental issues; through news messaging on Twitter, Instagram, and Facebook; and through content distributed to outlets such as Medium. *See* OPEN Government Act of 2007, Pub. L. No. 110-175, § 3, 121 Stat. 2524 (2007) (codified at 5 U.S.C. § 552(a)(4)(A)(ii)) (clarifying that "as methods of news delivery evolve . . . such alternative media shall be considered to be news-media entities"). These and the other communications channels referenced earlier in this letter routinely include information about current events of interest to the readership and the public. NRDC employs more than fifty specialized communications staff, including accomplished journalists and editors, and numerous other

advocates able to disseminate, through these and other channels, newsworthy information acquired through FOIA.

Organizations with NRDC's characteristics "are regularly granted news representative status." *Serv. Women's Action Network v. Dep't of Def.*, 888 F. Supp. 2d 282, 287-88 (D. Conn. 2012) (according media requester status to the American Civil Liberties Union); *see also Cause of Action v. Fed. Trade Comm'n*, 961 F. Supp. 2d 142, 163 (D.D.C. 2013) (explaining that an organization can qualify for media-requester status if it "distributes work to an audience and is especially organized around doing so").

III. Conclusion

Thank you for your help. Please call or email me with questions.

Sincerely,

Erik D. Olson
Senior Strategic Director
Health & Food
Natural Resources Defense Council, Inc.
1152 15th St., NW Suite 300
Washington, DC 20005
eolson@nrdc.org
Cell 202-246-6868

Enclosures in support of fee waiver and reduction requests (provided via OneDrive at [https://nrdc1-](https://nrdc1-my.sharepoint.com/:f:/g/personal/eolson_nrdc_org/EoJ2YYBEYfBEh0327F6p-i4B06RoFWD67HRDp_rN94GvHg?e=OpkSWr)

[my.sharepoint.com/:f:/g/personal/eolson_nrdc_org/EoJ2YYBEYfBEh0327F6p-i4B06RoFWD67HRDp_rN94GvHg?e=OpkSWr](https://nrdc1-my.sharepoint.com/:f:/g/personal/eolson_nrdc_org/EoJ2YYBEYfBEh0327F6p-i4B06RoFWD67HRDp_rN94GvHg?e=OpkSWr))

Attachments 1 through 30 (single .pdf file)

Exhibits A-K (single .pdf file).